IN THE

Supreme Court of the United States

October Term, [redacted] 1958

No. [redacted] 103

FLORER A. REYNOLDS,

Petitioner,

vs.

ROYAL MAIL LINES, LTD., a Corporation, and ASSOCIATED BANNING COMPANY, a Corporation,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on March 25, 1958.

Opinions Below.

The opinion of the District Court, printed in Appendix A hereto, is reported in 147 F. Supp. 223. The opinion of the Court of Appeals, printed in Appendix B hereto, is unreported.

Jurisdiction.

The judgment of the Court of Appeals, printed in Appendix C hereto, was entered on March 25, 1958. A timely petition for rehearing was denied on April 30, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether, contrary to the decisions of this Court in *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and to the true administration in the federal courts of the admiralty law governing the liability of shipowners for the unseaworthiness of their vessels, the court below erred in holding that the obstruction of the passageway by the ship's equipment resulting in injury to the petitioner, a stevedore required to work therein, did not render the shipowner liable in an action for unseaworthiness because the ship's equipment which obstructed the passageway resulting in petitioner's injury was not used by petitioner's fellow servants for the purpose intended.

2. Whether, contrary to the decisions of this Court in *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, and to the true administration in the federal courts of the admiralty law governing the liability of shipowners for the unseaworthiness of their vessels, the court below erred in affirming the non-liability of the shipowner to petitioner in his action for unseaworthiness upon the ground that petitioner may have been contributorily negligent in that petitioner knew of the obstruction of the passageway by the ship's equipment prior to petitioner's injury and the area was otherwise reasonably safe for the work petitioner was required to do.

Constitutional Provision and Statute Involved.

The pertinent constitutional provision and statute involved are printed in Appendix D hereto.

Statement of the Case.

On August 11, 1954, petitioner was employed in the Los Angeles Harbor as a longshoreman by the respondent Associated Banning Company, aboard the vessel S.S. Loch Gowan, a vessel owned by the respondent Royal Mail Lines, Ltd. [R. 41-42, 115].*

Petitioner was injured about 9:30 p.m. of that date while he was working as a member of a gang of longshoremen at the No. 3 hatch of the vessel. On the starboard side of that hatch there was located a winch, with a narrow passageway between the winch and the hatch. Prior to the time of the accident there had been placed standing on end a wooden platform known as an O'Brien in the passageway of the ship between the pilot house and the after side of the hatch and in the vicinity of the aforementioned winch [R. 257, 272].

O'Briens are part of the ship's equipment [R. 309] and this particular one was 102 inches long, 73½ inches wide with part of it of a thickness of 3 inches and the balance of a thickness of 1½ inches [Ex. 7; R. 53-54]. Its weight was estimated at several hundred pounds [R. 54]. The location of the O'Brien is shown on a photograph [Ex. 1; R. 87-88]. Witnesses who noticed the O'Brien before the accident stated that it appeared to be suspended or to be leaning against something [R. 105, 257, 273]. It wasn't until after the accident below described occurred that it was discovered, by witnesses who testified at the trial, that a rope was tied to the top corner of the O'Brien and extended from there to a point about four feet beyond the corner of the hatch opposite the

*The reference "R." is to the printed Transcript of Record on file in this Court.

aforesaid winch. This rope was tied fairly close to the deck onto a portion of said coaming [R. 62-63, 79, 93, 127, 260, 275]. The hatch coaming itself was about three to four feet high [R. 229]. There was no other fastening on the O'Brien nor was it secured to any portion of the vessel in any other manner [R. 63, 79, 260, 275].

As a matter of custom, objects like this O'Brien, are to be safely secured [R. 260]. The danger inherent in stevedoring work, where many rapidly moving operations are occurring simultaneously, require that the worker keep his eyes only on the incoming moving gear [R. 264]. Falls on deck by the longshoremen are frequent [R. 265]. For these reasons, waterfront custom decrees that passageways shall not be blocked by ropes or anything which would impede passageway [R. 266].

The record is silent on the subject of who placed the O'Brien in the position that it was before the accident or for what purpose this was done. The captain of the vessel testified that he had seen O'Briens used by longshoremen as windbreaks, although that is not their purpose, and if they are so used they must be properly secured in order to be safe [R. 301, 312-313]. An experienced longshoreman who had worked for many years in the Los Angeles waterfront area had never seen an O'Brien used for that purpose [R. 287-288].

The testimony is uncontradicted that longshoremen working in the hold as petitioner was at the time that the accident occurred have no duty to nor do they customarily inspect conditions around the work area on a ship [R. 117, 119-120, 260]. The captain of the vessel testified on behalf of respondent Royal Mail Lines, Ltd., that the working gear of the ship is his responsibility

and that if there are dangerous conditions on deck the officers try to secure or eliminate them [R. 304-305]. During changes of shift of longshore crews it is the practice for seamen to check the ship for safety and even during working periods the ship's crew patrol the ship and check over all hatch operations [R. 266, 273, 290, 315-316, 320]. The captain further testified that if his men saw an O'Brien on the vessel being used by longshoremen for weather protection they would not move it even if it were put up during the change in shifts but that they would report any unsafe condition to the foreman of the stevedores rather than do anything about it themselves [R. 305, 316, 317-318].

After loading cargo for an hour or more, the gang of which petitioner was a member started covering up the hatch [R. 44-45]. At the time that the accident in question occurred the forward and center sections of the hatch had been covered and the gang was in the process of covering the after portion thereof, the one closest to the winch previously described and in the area adjoining the place where the O'Brien referred to above was standing with a rope tied from the top of the O'Brien to the lower part of the hatch coaming. The accident occurred as a hatchboard was being brought into place over the uncovered portion of the hatch [R. 46, 47-48, 51-52, 71, 118-119, 255].

At that time the hatch gang including the petitioner was engaged in putting on the hatch covers in the customary and usual manner [R. 67, 93, 120-121, 267]. As part of that operation a toggle line (a piece of rope tied on to hooks which are fastened into the object being controlled) was fastened to the hatch cover being lowered into place and was being held at its lower end by the petitioner for the purpose of pulling and guiding the cover

into its proper place [R. 52, 122, 259, 281]. As part of this operation the petitioner was walking backwards approaching the area where the O'Brien was standing with his left side toward the hatch coaming [R. 61, 122-123, 161-162, 237, 259, 280]. As he rounded the corner of the hatch, his back was towards the up-ended O'Brien. During this maneuver he had reached a point about three feet around the corner of the hatch when the accident occurred [R. 163].

Petitioner who testified he had not seen this O'Brien at any time earlier that evening [R. 123, 230-231] for the first time thought he saw something out of the corner of his eye as he turned the corner of the hatch and he ducked but as he did his head struck the rope tied to the O'Brien. He heard someone cry a warning [R. 124]. And it was at this moment that petitioner was struck by the O'Brien on the head and shoulders [R. 53, 124-125, 163-164]. The O'Brien landed on top of petitioner and threw him back against the pilot house [R. 56-57, 232].

Suit was instituted by petitioner against respondents in the United States District Court. The jurisdiction of the District Court was invoked under Article III, Section 2 of the United States Constitution and 28 U. S. C. 1333.

The complaint alleged two causes of action for personal injuries: the first predicated on the negligence of the shipowner [R. 3-8]; the second on the failure to provide petitioner with a seaworthy vessel [R. 8-10]. The first cause of action was tried by a jury and resulted in a judgment in favor of the respondent shipowner. No appeal was taken from said judgment.

The second cause of action for unseaworthiness was tried by the District Court sitting without the jury on

the evidence adduced at the trial of the first cause of action [R. 25]. On this issue, the District Court rendered a written opinion (147 Fed. Supp. 223; App. A) in favor of the respondent shipowner.

The District Court held that the vessel was not unseaworthy: first, because the O'Brien "was not being used for the purpose for which intended" (*id.*, at p. 228); second, because the area of the deck on which petitioner was injured was in any event not unseaworthy because the deck was "well lighted" and petitioner "was aware of the presence of the upended 'O'Brien'" (*id.*, at p. 228). Findings of Fact and Conclusions of Law were made in accordance therewith [R. 25-29] and judgment of dismissal entered [R. 30-31].

An appeal was prosecuted from the aforesaid judgment to the United States Court of Appeals for the Ninth Circuit [R. 32-33]. The judgment was affirmed on March 25, 1958 (App. C). The court rendered a written opinion (App. B) in which it adopted the findings and conclusions of the District Court. The court held that the warranty of seaworthiness applies only when the ship's equipment is "employed or used for some purpose for which it is intended" (App. B, p. 13). The court below held also, relying on the findings of the District Court, that the deck of the ship was not unseaworthy (App. B, pp. 14-15).

Reasons for Granting the Writ.

1. The decision and judgment of the court below in the instant case are in conflict with the decisions of this court in *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85. The questions presented are of importance in the administra-

tion of federal admiralty law affecting the obligation of seaworthiness owed by an owner of a ship to the stevedore injured while working thereon. In assessing this obligation, the courts below applied improper legal standards to undisputed facts in a manner corrosive of the traditional policy of protection for stevedores and seamen formulated by this Court. The questions presented, therefore, merit review by this Court.

2. The undisputed facts are as follows: There was a rope extending over the passageway in which the petitioner was required to work. The rope was tied at one end to the corner of the hatch coaming close to the deck and at the other end to the top of the O'Brien standing on end. The rope ran up at an angle with the lowest part about a foot from the deck and the highest part either about 8½ feet or about 6 feet above the deck, the entire length of the rope being in the area in which petitioner was required to work. The O'Brien was otherwise unsecured. While in the area in which petitioner was required to be and while walking backward, as he was required to do in performing the particular task in which he was engaged, petitioner came in contact with the rope or the O'Brien, and the O'Brien as a result fell upon petitioner and injured him. The positioning of the O'Brien and the rope in the area where they were, and the failure to secure the O'Brien at both ends, were contrary to customary practices of safety.

None of these undisputed facts were considered by the court below in reaching its decision. Instead, the court declared, first, as a matter of law, that the warranty of seaworthiness applies only when the ship, its gear or equipment is reasonably "employed or used for some purpose for which it is intended" (App. B, p. 13). Since the District Court found that the O'Brien and the rope had been placed

in the passageway by petitioner's fellow servants for a use and purpose not intended (App. B, p. 14, footnote 2), the court below appears to have concluded that the petitioner had failed as a matter of law to prove unseaworthiness.

Clearly, this rule of law and its application herein is in conflict with the decisions of this Court and the decisions of other courts of appeal on the same question. This Court has held that the shipowner's duty to a seaman to furnish a seaworthy ship is absolute and non-delegable, not predicated on negligence. *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 102. The question cannot be, on the issue of unseaworthiness, whether the O'Brien here was used properly to protect the deck or improperly as a windbreak. The sole question is whether the obstruction of the passageway by the O'Brien and the rope which was strung across the area and attached to the O'Brien rendered the area dangerous and an unsafe place to work. As Judge Hand recently stated in *Grillea v. United States*, 232 F. 2d 919, 923 (C. A. 2, 1956), "there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting the defect."

To enunciate a rule of law that a ship cannot be deemed unseaworthy when its equipment is not "employed or used for some purpose for which it is intended" is to make the shipowner's liability dependent, not on the hazardous condition of the ship and its equipment, but on the vagaries of the use and employment of the ship and its equipment by the crew or fellow servants of the injured stevedore. Thus, as in the case herein, an owner can avoid liability on his absolute warranty of seaworthiness despite the undisputed existence of a patently dangerous and unsafe condition on

his ship. Such a rule of law, and result, are clearly inconsistent with the decisions of this Court in *The Osceola*, 189 U. S. 158; *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, and *Seas Shipping Co. v. Sieracki*, 328 U. S. 85. It should be noted that in *Mahnick*, this Court stated: "The stage was used in the repair of the ship, and was as intimately associated with it and with the seaman's employment *as are the gangways or other appliances or the passageways used by the seaman in doing his work.*" (P. 10.) (Emphasis supplied.)

The three decisions cited by the court below in enunciating its rule of law (App. B, p. 13) do not appear relevant nor to support the court's position. In *Nunes v. Farrell Lines* (C. A. 1, 1955), the Court of Appeals reversed a judgment of nonsuit and held that there was evidence to go to the jury on the issue of unseaworthiness. See also, *Carter v. Schooner Pilgrim*, 238 F. 2d 702 (C. A. 1, 1956). In *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397 (C. A. 2, 1954), the judgment was reversed because the trial court had improperly instructed the jury that the shipowner could be found liable, "despite fully adequate equipment" (p. 399), solely on the basis of a failure properly to supervise the operation. The case was subsequently distinguished in *Pioneer S.S. Co. v. Hill*, 227 F. 2d 262 (C. A. 6, 1955). In *The Tacoma*, 89 F. 2d 792 (C. A. 5, 1936), the court found that the appliance which caused the injury was not defective. The case was decided before the decisions of this Court in *Mahnich* and *Sieracki* and was in any event soon distinguished in *The H. A. Scandrett*, 87 F. 2d 708, 711 (C. A. 2, 1937).

What the court below appears to have confused is this: While absolute liability of a shipowner may be predicated solely on failure to provide a vessel of "reasonable fitness," it does not follow that a ship or its equipment is seaworthy

because the ship or equipment which caused the injury was not used for its intended purpose. The O'Brien here and the rope attached thereto obstructed the passageway where petitioner was required to work. Such obstruction rendered the area unsafe to work, and this dangerous condition made the ship unseaworthy, whether or not the O'Brien and rope were used or employed in the area for a purpose not intended. *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 103. It is the "hazardous condition," the "unsafe place to work" which renders the vessel unseaworthy.

3. If the "findings" of the District Court are considered in their totality (App. B, pp. 14-15, F. N. 2), they will be found to rest on two propositions of law: The first, that petitioner could not recover in his action for unseaworthiness because the "O'Brien" was not used for a purpose for which it was intended (Findings, 6, 7, 8, 9, 10, 11; App. B, pp. 14-15, F. N. 2), the second, that the petitioner knew, or should have known, the position of the "O'Brien" before he was injured and that the deck was not unseaworthy because otherwise well-lighted, dry and free of foreign substance.* (Findings, 11, 12, 13, 14.) We have endeavored to show above that the first proposition of law is untenable. It is submitted that the second proposition is equally fallacious.

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*In its written opinion, the District Court made this second conclusion very plain. The court stated in one paragraph that the deck, even with the O'Brien thereon, was reasonably safe for purposes intended; then followed this conclusionary statement with the statement in the very next paragraph that the "deck was well lighted" and petitioner was "aware of the presence" of the O'Brien prior to the accident. The Court of Appeals merely adopted these findings and affirmed the District Court's holding that such prior knowledge coupled with the lighting of the deck and its freedom from foreign substances rendered the deck seaworthy, despite the undisputed evidence with respect to the obstruction of the passageway on the deck.

Mr. Justice Frankfurter stated in *Pope v. Talbot, Inc. v. Hazen*, 346 U. S. 406, 415, that the right to recover for unseaworthiness "is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages." In *Mahnich v. Southern S.S. Co.*, 321 U. S. 96, 103, this Court stated: "Whether petitioner knew of the defective condition of the rope does not appear, but in any case the seaman, in the performance of his duties, is not deemed to assume the risk of unseaworthy appliances." See also, *Palermo v. Luckenbach Steamship Co.*, 355 U. S. 20. In basing their decisions on findings that the area was "well lighted," the decks "dry and free of foreign substances"; and that petitioner was "aware of the position" of the "O'Brien," the courts below erroneously equated the liability of the shipowner for unseaworthiness with his duty to use reasonable care to keep the vessel reasonably safe for invitees. This equation was improper. Seaworthiness is a higher standard, as this Court has held. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 94.

The court below, disregarding the undisputed evidence, pointed to the findings of the District Court and held them to be not "clearly erroneous" (App. B, pp. 14-15). But the conflicts in the evidence to which the court below referred were immaterial and in no way inconsistent with the undisputed evidence in the record upon which the issue of unseaworthiness depended. *Cf., Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U. S. 360.

Hence, even if there was a dispute as to the "exact location" of the "O'Brien" (App. B, p. 14), there was no dispute that the "O'Brien" and the extended rope obstructed the passageway in which petitioner was required

to work. Whether the "O'Brien" was standing on its "long end or on the wide end" (App. B, p. 14) was totally irrelevant, so long as it was undisputed that the rope which ran from the "O'Brien" to the hatch coaming rendered the area a hazardous condition for petitioner to work. Whether the "O'Brien" was "parallel or cater-corner to the winch"; just "exactly where" the rope was tied to the "O'Brien"; just where "the O'Brien" was with respect to the corner of the hatch (App. B, pp. 14-15), all these questions were peripheral, and even if accepted on respondents' terms, in no way affected the uncontradicted evidence that the O'Brien and the rope obstructed the passageway in which petitioner was required to work.

The so-called "findings" of the District Court, upon which the court below relied, are therefore found to be either irrelevant to the issue here, or in actuality, conclusions of law unsupported by any evidence in the record. The salient facts are not in dispute, and the real question is not whom to believe, but whether the ship on the undisputed evidence was rendered unseaworthy. See, *Krey v. United States*, 123 F. 2d 1008, 1010 (C. A. 2, 1941).

4. This Court has stressed the fundamental policy underlying the liability of a shipowner for the unseaworthiness of his vessel. It has emphasized the helplessness of those employed on ships "to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss" (*Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 93. "Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . It is a form of absolute duty owing to all within the range of its humanitarian policy" (*id.*, at p. 94).

This broad policy, it is respectfully submitted, should control the decision of this Court in determining whether review herein should be granted. If the humanitarian policy is to continue to receive vitality, the standards applied by the court below should not be permitted to stand. Liability of a shipowner for the unseaworthiness of his vessel on undisputed evidence should not be controlled by considerations of negligence which the policy of the law forbids. The duties owed by a ship to its seamen and stevedores are clearly no less than those of a railroad to its workers, for whom this Court has continually stressed the protective policy of the law and common justice exist, transcending common law principles of tort liability. See, *Sinkler v. Missouri Pacific Railroad Co.*, 356 U. S. 326; *Ferguson v. St. Louis-San Francisco Railway Co.*, 356 U. S. 41; *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

BEN MARGOLIS,

Counsel for Petitioner.

APPENDIX A.

Memorandum of Decision.

[TITLE OF COURT AND CAUSE]

MATHES, District Judge:

Invoking the jurisdiction of this court upon the ground of diversity of citizenship [28 U. S. C. § 1332], plaintiff has filed a complaint on the "law side" seeking damages for personal injuries alleged to have been sustained while he was working as a longshoreman aboard the SS "Lock Gowan", then moored at dock in the navigable waters of Los Angeles Harbor.

In one cause of action it is asserted that plaintiff's injuries and consequent damages were a proximate result of a breach by the defendant shipowner, Royal Mail Lines, Ltd., of its implied warranty under maritime law of the seaworthiness of the SS "Loch Gowan".

In the other cause of action it is asserted that plaintiff's injuries and consequent damages were a proximate result of a breach by the defendant shipowner of its duty of ordinary care under the circumstances; and it is alleged that by reason of the same conditions claimed to render the vessel unseaworthy, the shipowner was negligent in failing to maintain the vessel "and its equipment, gear and appliances in a safe . . . condition . . . ."

The shipowner has filed a third-party complaint for indemnification against plaintiff's stevedoring employer, Associated Banning Company [Fed. R. Civ. P. 14], and the latter has replied with a counterclaim.

It is a story often told that the warranty of seaworthiness is implied by maritime law from the relationship of the parties; originally between shipowner and shipper

[The Southwark, 191 U. S. 1, 9 (1903); The Silvia, 171 U. S. 462, 464 (1898); then between shipowner and seaman [The Osceola, 189 U. S. 158 (1903)]; and later between shipowner and longshoreman [Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946); *cf.*: Pope & Talbot, Inc. v. Hawn, 346 U. S. 406 (1953); Berryhill v. Pas. Far East Line, ... F. 2d ..... (9th Cir. 10/24/56); Dixon v. United States, 219 F. 2d 10 (2d Cir. 1955)].

Not only is the claimed breach of the warranty of seaworthiness "of admiralty cognizance", but also the actionable negligence here alleged is a maritime tort, having occurred in navigable waters. [Gonsalves v. Morse Dry Dock Co., 266 U. S. 171 (1924); Atlantic Transport Co. v. Imbrovek, 234 U. S. 52 (1914); The Plymouth, 70 U. S. (3 Wall.) 20, 36 (1865); United States v. Matson Nav. Co., 201 F. 2d 610 (9th Cir. 1953)]

Nonetheless, plaintiff did not choose to invoke the admiralty jurisdiction of this court. [28 U. S. C. § 1333.] Nor did he attempt to invoke jurisdiction under 28 U. S. C. § 1331, by claiming that the causes asserted under maritime law present a case which "arises under the Constitution, laws or treaties of the United States." [*Cf.*: Paduano v. Yamashita K K K, 221 F. 2d 615 (2d Cir. 1955), *affirming* 120 F. Supp. 304 (E. D. N. Y. 1954); Doucette v. Vincent, 194 F. 2d 834, 839-842 (1st Cir. 1952); Jordine v. Walling, 185 F. 2d 662 (3rd Cir. 1950).]

Instead, plaintiff declared under the diversity jurisdiction of this court, which normally is only invoked to assert claims arising under state law. [Erie R. R. v. Tompkins, 304 U. S. 64 (1938).] Yet he does not rely upon state law, but upon the maritime law; and it hardly need

be added that "the party who brings a suit is master to decide what law he will rely upon. . . ." [The Fair v. Kohler Die Co., 228 U. S. 22, 25 (1913).]

Although presenting claims under the maritime law for adjudication in this court, plaintiff asserts the right under the "saving to suitors clause" of 28 U. S. C. § 1333(1) to have his case trial on the "law side", rather than in admiralty. That the "saving to suitors clause" can be thus used is but another of the many anomalies of federal diversity jurisdiction. [See: Pope & Talbot, Inc. v. Hawn, *supra*, 346 U. S. at 409, 411, 419; Caldarola v. Eckert, 332 U. S. 155, 157 (1947); Williams v. Tide water Ass. Oil Co., 227 F. 2d 791 (9th Cir. 1955), *cert. denied*, 350 U. S. 960 (1956).]

The probability is that the common-law remedy of trial by jury would have been available to plaintiff in the California courts on both causes of action. [See Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal. 2d 365, 159 P. 2d 1 (1945).] And it is held that where as here federal jurisdiction is based solely upon the ground of diversity of citizenship, this court is "in effect, only another court of the State." [Guaranty Trust Co. v. York, 326 U. S. 99, 108 (1945).]

When a seaman sues under the Jones Act in a state court, concurrent jurisdiction is expressly granted to enforce this statutory addition to the maritime law. [See: 46 U. S. C. § 688, 45 U. S. C. § 56; Garrett v. Moore-McCormack Co., 317 U. S. 239, 243 (1942); Engel v. Davenport, 271 U. S. 33, 37-38 (1926); Panama R. R. v. Vasquez, 271 U. S. 557, 560-62 (1926); Second Employers' Liability Cases, 223 U. S. 1, 55-59 (1912).] As pointed out in Panama R. R. v. Johnson, 264 U. S. 375, 388-89 (1924), the election which the Jones Act provides

for a seaman "is between alternatives accorded by the maritime law as modified [by that statute], and not between that law and some non-maritime system." [See: Pacific S.S. Co. v. Peterson, 278 U. S. 130, 134, 138 (1928); Williams v. Tide Water Assn. Oil Co., *supra*, 227 F. 2d at 794.]

But where, as here, a longshoreman or a seaman or other suitor seeks recovery in any court other than a court of admiralty on a claim cognizable under general maritime law, he necessarily relies upon the "saving to suitors clause." [28 U. S. C. § 1333(1).] And as the Court observed with respect to the "saving to suitors clause" in Caldarola v. Eckert, *supra*, 332 U. S. at 157-58: "Whether Congress thereby recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether it was concerned only with 'saving' to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available, is a question on which the authorities do not speak with clarity. Compare Waring v. Clarke, 5 How. 440, 460-61; Taylor v. Carryl, 20 How. 583, 598-99 . . . with Schoonmaker v. Gilmore, 102 U. S. 118; The Hamilton, 207 U. S. 398; Chelentis v. Luckenbach S.S. Co., 247 U. S. 372; C. J. Hendry Co. v. Moore, 318 U. S. 133; Seas Shipping Co. v. Sieracki, 328 U. S. 85, 88-89."

Some study of the decisions since original enactment of the "saving to suitors clause" in § 9 of the Judiciary Act of 1789 [1 Stat. 76-77] reveals that the observation just quoted should rank high in judicial understatement. The coming of the Jones Act in 1920 [31 Stat. 1007] did not contribute to clarification, and Erie R. R. v. Tompkins, *supra*, 304 U. S. 64, has served to accent the problem:

[See: Stevens, Erie R. R. v. Tompkins and The Uniform General Maritime Law, 64 Harv. L. Rev. 246 (1950); Palfrey, The Common Law Courts And The Law of The Sea, 36 Harv. L. Rev. 777 (1923).]

The rationale of current authority appears to be that whenever a suitor on a claim of admiralty cognizance is accorded any remedy at all in a state court, the "supremacy clause" [U. S. Const. Art. VI, cl. 2] serves to prevent state remedy from "diluting" or diminishing a right, or adding to a liability, which would exist under maritime law if enforced in a court of admiralty. [Pope & Talbot, Inc. v. Hawn, *supra*, 346 U. S. at 109-10; Garrett v. Moore-McCormack Co., *supra*, 317 U. S. at 243; Carlisle Packing Co. v. Sandanger, 259 U. S. 255, 259 (1922); Western Fuel Co. v. Garcia, 257 U. S. 233, 240-42 (1921); *cf.*: Madruga v. Superior Court, 346 U. S. 556, 560-61 (1954); Caldarola v. Eckert, *supra*, 322 U. S. at 158, 163-65; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 160-61, 166-69 (1920); Knapp, Stout & Co. v. McCaffrey, 177 U. S. 638, 648 (1900); The Moses Taylor, 71 U. S. (4 Wall.) 411, 431 (1866).]

In any event it seems likely that the California courts would adopt and apply rules of the maritime law as the law of the State [Uravic v. F. Jarka Co., 282 U. S. 234, 240 (1931)], in cases where the maritime law would be applicable if the admiralty jurisdiction of this court had been invoked. [See: Intagliata v. Shipowners & Merchants Towboat Co., *supra*, 159 P. 2d at 5-7; Occidental Ind. Co. v. Industrial Acc. Comm., 24 Cal. 2d 310, 149 P. 2d 841 (1944).]

Recognizing the inherent difficulties attendant upon asking a jury to determine issues as to liability for unseaworthiness as well as negligence in a single case—and *a*

fortiori where both are claimed to arise from the same conduct, the parties at bar stipulated to waive jury trial of the claim based upon the warranty of seaworthiness.

A jury trial was had of the issue of negligence, and the jury returned a verdict in favor of the defendant shipowner. A motion for a new trial is pending, but counsel have stipulated that ruling on the motion be deferred until after decision on the unseaworthiness claim.

The jury's verdict on the issue of negligence cannot properly guide the court in finding on the issue of unseaworthiness, for much more may well be required to serve as proof of the former than of the latter. [See: Seas Shipping Co. v. Sieracki, *supra*, 328 U. S. at 85, 87, *affirming*, 149 F. 2d 98, 101 (3rd Cir. 1945); McCarthy v. American Eastern Corp., 175 F. 2d 724 (3rd Cir. (1949); German v. Carnegie-Ill. Steel Corp., 156 F. 2d 977, 979 (3rd Cir. 1946); *cf.* Baltimore S.S. Co. v. Phillips, 274 U. S. 316 (1927).]

Fault is an ingredient of liability for negligence; the proof must show a careless breach of duty owed to use ordinary care under the circumstances. [Schulz v. Penn. R. R., 350 U. S. 523, 525 (1956); Pope & Talbot, Inc. v. Hawn, *supra*, 346 U. S. at 406; States S.S. Co. v. Rothschild Int. Stev. Co., 205 F. 2d 253, 256 (9th Cir. 1953); Guerrini v. United States, 167 F. 2d 353 (2d Cir. 1948).]

Fault is not, however an ingredient of liability for breach of the shipowner's implied warranty of seaworthiness. This warranty is "essentially a species of liability without fault, analogous to other well known instances in our law." [Seas Shipping Co. v. Sieracki, *supra*, 328 U. S. at 94; Mahnich v. Southern S.S. Co., 321 U. S. 96, 100 (1944).]

As Judge Wright aptly put it in Boudoin v. Lykes Bros. S.S. Co.: "The warranty of seaworthiness is a kind of liability without fault in which knowledge of the circumstances creating the unseaworthiness is immaterial." [112 F. Supp. 177, 180 (E. D. La. 1953), *rev'd*, 211 F. 2d 618 (5th Cir. 1954), *rev'd*, 348 U. S. 336 (1955).]

Thus liability for all damages proximately resulting from any breach of the implied warranty of seaworthiness is imposed by law upon the shipowner, regardless of whether or not the unseaworthy condition aboard the vessel, or indeed the vessel itself, happens to be within the owner's control [Petterson v. Alaska S.S. Co., 205 F. 2d 478 (9th Cir. 1953), *aff'd per curiam*, 348 U. S. 396 (1954); Grillea v. United States, 232 F. 2d 919, 922 (2d Cir. 1956); Rogers v. U. S. Lines, 205 F. 2d 57 (3d Cir. 1953), *rev'd*, 347 U. S. 984 (1954); and regardless of whether or not the defect was known, or in the exercise of due care could have been known to the shipowner. [Boudoin v. Lykes Bros. S.S. Co., *supra*, 348 U. S. at 339; The Edwin I. Morrison, 153 U. S. 199, 210 (1894); Lahde v. Soc. Armadora Del Norte, 220 F. 2d 357, 360 (9th Cir. 1955).]

But the content of the warranty is not that the ship or gear or equipment is absolutely seaworthy and safe in all events, but only reasonably so, and that only when employed or used for some purpose for which intended. [Boudoin v. Lykes Bros. S.S. Co., *supra*, 348 U. S. at 339; Mahnich v. Southern S.S. Co., *supra*, 321 U. S. at 103; Nunes v. Farrell Lines, 227 F. 2d 619, 622 (1st Cir. 1956); Poignant v. United States, 225 F. 2d 595, 598 (2d Cir. 1955); Manhat v. United States, 220 F. 2d 143, 149 (2d Cir. 1955); Freitas v. Pacific-Atlantic S.S. Co., 218 F. 2d 562 (9th Cir. 1955); Fireman's Fund Ind. Co.

v. United States, 211 F. 2d 773, 776 (5th Cir. 1954); Benton v. United Towing Co., 120 F. Supp. 638, 640 (N. D. Cal. 1954).]

Plaintiff at bar alleges in detail that: "The unsafe, improper and unseaworthy condition of the vessel and of its equipment, gear and appliances consisted, among other things, of the following: a wooden platform was left standing on its side and was standing on its side leaning against the bulkhead near the No. 3 hatch of said vessel unsecured except by a single and inadequate rope tied at one upper corner of the platform and running to the said No. 3 hatch extending over an area where longshoremen were required to be in order to perform their work, and with no second rope at all to hold the other portion of said platform in place; on said date and by reason of the unseaworthy condition of the vessel as aforesaid, said platform fell over and struck plaintiff on the head and shoulder and knocked him down against the bulkhead causing him to strike his back against a protruding bolt with great force and plaintiff thereby suffered severe personal injuries as hereinafter more specifically set forth."

The burden of proof on the issues of fact thus tendered is upon plaintiff to establish, by a preponderance of the evidence, that a breach of the shipowner's implied warranty of seaworthiness was a proximate cause of the injuries. [Freitas v. Pacific-Atlantic S.S. Co., *supra*, 218 F. 2d at 564; Fireman's Fund Ind. Co. v. United States, *supra*, 211 F. 2d at 776; Grillo v. United States, 177 F. 2d 904, 905 (2d Cir. 1949).]

The up-ended platform of which plaintiff complains is called by seagoing men an "O'Brien"; and it is conceded that the intended use of such a platform is to protect the deck surface during loading and unloading operations.

Moreover the evidence establishes that the up-ended "O'Brien" was not being used for the purpose for which intended, but was being employed by the longshoremen as a make-shift wind break. [*Cf.* Connally v. Weyerhaeuser S. C. Co., 236 F. 2d 848 (2d Cir. 1956).]

The evidence also establishes that the "O'Brien" was seaworthy—reasonably safe and fit—for the purpose for which intended, namely, to serve as temporary-cover protection for the surface of the deck.

The unseaworthiness claimed then is not in the condition of the "O'Brien" as such, but in the condition of the deck which was created by the longshoremen's misuse of the up-ended "O'Brien" as a windbreak, and by the protruding bolt from the bulkhead. [*Cf.* Grillea v. United States, *supra*, 232 F. 2d at 922-23.]

As to the bolt, the evidence fails to establish that plaintiff came into contact with it, so even if it be assumed that its presence created an unseaworthy condition, there appears no causal connection between the bolt and plaintiff's injuries. [*Cf.* Peterson v. United States, 224 F. 2d 748, 751 (9th Cir. 1955).]

As to the upended "O'Brien", the evidence fails to establish that its misuse by the longshoremen rendered the deck unseaworthy. To the contrary, it appears that the deck, even with the upended "O'Brien" thereon, was reasonably safe for purposes intended; and that is all the warranty of seaworthiness assures.

The deck was well lighted. [*Cf.*: Pacific Far East Lines v. Williams, 234 F. 2d 378 (9th Cir. 1956), *cert. denied* ..... U. S. ..... (Oct. 16, 1956); Lahde v. Soc. Armadora Del Norte, *supra*, 220 F. 2d at 358.] The

"O'Brien" did not fall until after plaintiff himself, or one end of a "strong back" he was helping to carry, collided with either or both the "O'Brien" and the rope securing it. And though he denied it, the circumstantial evidence is convincing that plaintiff was aware of the presence of the upended "O'Brien".

Since plaintiff's motion for a new trial of the issue of negligence is still pending and that issue thus remains *in fieri*, it would not be appropriate for the court now to make any finding as to the proximate cause of plaintiff's injuries and consequent damage, other than that they were not proximately caused by any breach of the shipowner's implied warranty of seaworthiness. [Luckenbach v. McCahan Sugar Co., 248 U. S. 139, 145 (1918); *cf.*: Nunes v. Farrell Lines, *supra*, 227 F. 2d at 621; Firemen's Fund Ind. Co. v. United Sates, *supra*, 221 F. 2d at 777; Edwards v. Steinas, 207 F. 2d 734, 736 (4th Cir. 1953); Benton v. United Towing Co., *supra*, 120 F. Supp. at 640.]

This conclusion makes it unnecessary to consider at this time the claims of indemnification. [See: Halcyon Lines v. Haenn Ship Corp., 342 U. S. 282 (1952); American President Lines v. Marine Terminals Corp., ... F. 2d ... (9th Cir. 6-14-56); Palazzolo v. Pan-Atlantic S.S. Corp., 211 F. 2d 277 (2d Cir. 1954); *aff'd*, 349 U. S. 901 (1955); Brown v. American-Hawaiian S.S. Co., 211 F. 2d 16 (3d Cir. 1954); United States v. Rothschild Int. Stev. Co., 183 F. 2d 181 (9th Cir. 1950).]

Attorneys for defendant will lodge with the Clerk within ten days appropriate findings of fact and conclusions of law, to be settled pursuant to local rule 7.

Filed: Dec. 20, 1956

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

[TITLE OF COURT AND CAUSE]

Before: FEE and BARNES, Circuit Judges; and HAMLIN, District Judge.

HAMLIN, District Judge:

Plaintiff filed this action in the United States District Court, Southern District of California, Central Division, alleging that he received injuries while he was employed as a longshoreman by Associated-Banning Company, a corporation, (hereafter Associated), on board the vessel S.S. Loch Gowan in the Los Angeles Harbor area. The vessel was owned by Royal Mail Lines, Ltd., one of Appellees herein (hereafter Royal).

The complaint, invoking the jurisdiction of the Court upon the ground of diversity of citizenship, 28 U. S. C. §1332, was in two counts. The first count alleged that his injuries occurred by reason of the negligence of Royal in failing to provide plaintiff with a safe, proper and seaworthy place in which to work, and in negligently failing to maintain, control, operate and keep said vessel, its equipment, gear and appliances in a safe, proper and seaworthy condition. The second count alleged that plaintiff's injuries occurred by reason of the failure of Royal to provide him with a seaworthy vessel.

Prior to trial Appellee Royal brought a third party action against Appellee Associated alleging that if the vessel was unseaworthy, such unseaworthiness was caused by Associated, and praying that in such event Royal recover full indemnity against Associated.

By stipulation of the parties, the first cause of action was tried to a jury, and the second cause of action based upon unseaworthiness was tried to the Court on the evidence adduced at the trial of the first cause of action. The jury returned a verdict in favor of Royal upon the first cause of action, from which verdict and judgment plaintiff has taken no appeal. Upon the second cause of action, the Court made findings of fact and concluded that the vessel, her gear, appliances and equipment were seaworthy and reasonably fit for the purpose for which they were intended, and rendered a judgment for Royal on this issue and dismissed the third party complaint. Plaintiff appeals from this judgment alone, which appeal was timely taken. Jurisdiction to this Court rests upon Title 28 U. S. C. §§1291 and 2107.

The evidence discloses that the plaintiff was one of a gang of longshoremen who commenced work at No. 3 hatch upon the vessel in question about 7 P. M. and that he was injured about 9 P. M. when a wooden platform,[1] called by seamen an "O'Brien", which was in the vicinity of a No. 3 starboard winch, fell and struck the plaintiff and caused certain claimed injuries to him. The Court found that before the accident fellow servants of the plaintiff employed by Associated had rigged the O'Brien in an up-ended position, and that it was being employed as a windbreak. The O'Brien was designed to protect the wooden deck surface of the vessel during loading and unloading operations, and was not designed to be used as a windbreak. The evidence shows that the O'Brien was secured by a rope tied at one upper corner and run-

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[1] 73½ inches by 102 inches, Weighing "a couple of hundred pounds".

ning to the No. 3 hatch. While the hatch gang, including the Appellant, were engaged in putting the hatch covers on the No. 3 hatch, the Court found that the O'Brien fell upon plaintiff "after either plaintiff himself or a rope he was pulling which led to a portion of a hatch cover he was then helping to move, collided with either or both the O'Brien itself and the rope securing it to the after starboard corner of the hatch."

The right of a seaman to recover damages from the owner of a ship by reason of the unseaworthiness of the ship has been extended to stevedores while doing work upon the ship. Seas Shipping Co. v. Sieracki (1946), 328 U. S. 85. The shipowner's implied warranty of seaworthiness is, "essentially a species of liability without fault, analogous to the other well-known instances in our law." *Id.* at 294. The shipowner's liability for unseaworthiness is imposed by law regardless of whether or not the shipowner was negligent. *Ibid.*; Read v. United States (3 Cir., 1953), 201 F. 2d 758, 763.

This warranty of seaworthiness, however, is not that the ship, or gear, or equipment is absolutely seaworthy and safe in all events, but only reasonably so, and then only when employed or used for some purpose for which it is intended. Nunes v. Farrell Lines, (1 Cir., 1955) 227 F. 2d 619; Berti v. Compagnie De Navigation Cyprien Fabre, (2 Cir., 1954) 213 F. 2d 397; The Tawnie, (5 Cir., 1936) 80 F. 2d 792.

Appellant contends that the evidence clearly indicated that there was an unseaworthy condition and that the findings of the Court below with respect to unseaworthiness are without support in the evidence, and for this reason the judgment of the Court below should be reversed. While the witnesses generally agreed upon the

general location of the O'Brien, there were differences in the testimony as to its exact location,—whether it was standing on its long end or on the wide side, just where it was with respect to the corner of the hatch, just exactly where the rope supporting it was tied, whether the plaintiff had seen the O'Brien before the accident or not, whether it was the rope which supported the O'Brien or the O'Brien itself which was struck, whether the O'Brien was parallel or cater-corner to the winch. Some seven photographs were introduced in evidence, five of them showing the location on the vessel where the acident occurred and two of them showing pictures of an O'Brien which was similar to, if not the precise O'Brien involved in the accident.

The learned judge who tried the case had the opportunity to see and hear all of the witnesses, to see the pictures introduced in evidence, and to listen to the explanation of the witnesses in reference to these pictures. At the conclusion of the case, the trial judge made findings as set out in the footnote.[2] Thereafter, the Court con-

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[2] The Court finds:

* * *

(6) That prior to said accident the fellow servants of plaintiff employed by Associated-Banning Company rigged a windbreak in the vicinity of the after No. 3 starboard winch.

(7) That an upended 'O'Brien' or wooden platform, 102" by 73½" by 3" in size, belonging to the S.S. Loch Gowan, was employed as said windbreak.

(8) That said 'O'Brien' was designed to protect the wooden deck surface of the vessel during loading and unloading operations and was not designed to be used as a windbreak.

(9) That the use to which plaintiff's fellow servants, the longshoremen, put said 'O'Brien' was not a purpose for which it was intended.

(10) That there was no defect or unseaworthiness of said 'O'Brien' if used for the purpose for which it was intended.

cluded as a matter of law from these findings that the vessel, her gear, appliances and equipment were seaworthy and reasonably fit for the purpose for which each was intended to be used.

The burden of proof of unseaworthiness rested upon the Appellant. Freitas v. Pacific-Atlantic Steamship Co., (9 Cir., 1955) 218 F. 2d 562.

"Ordinarily, where there is a dispute as to fact which must be resolved from the conflicting testimony of witnesses, the findings of the trial judge who had the opportunity to observe the demeanor of the testifying witnesses and thus to judge their credibility, are conclusive upon appeal unless clearly erroneous." Overman v. Loesser, (9 Cir., 1953) 205 F. 2d 521, 522.

As indicated above, the trial Court found no unseaworthiness of the O'Brien or of the deck of the ship in the vicinity of the accident. This Court cannot say that the

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(11) That the positioning of said 'O'Brien' in an upended manner for use as a windbreak did not render the deck at No. 3 hatch unsafe or unseaworthy.

(12) That at all times pertinent, the area in and about place where plaintiff's accident occurred was well lighted and the decks dry and free of foreign substance.

(13) That prior to plaintiff's accident he was aware of the position of the said 'O'Brien'.

(14) That said 'O'Brien' fell after either plaintiff himself, or a rope he was pulling which led to a portion of a hatch cover he was then helping to move, collided with either or both the 'O'Brien' itself and the rope securing it to the after starboard corner of the hatch.

(15) That as a result of said 'O'Brien' falling, plaintiff fell but did not come in contact with a bolt protruding from the face of the pilot house aft of No. 3 hatch 20" above the surface of the deck.

(16) That the bolt or bolts protruding from the face of the pilot house were used to secure portable metal shields and were reasonably fit and safe for the purpose for which they were intended."

findings of fact of the lower Court were clearly erroneous or that they were erroneous at all. Rule 52(a), Fed. Rules Civ. Proc.

The judgment of the District Court is affirmed.

(Endorsed:) Opinion. Filed Mar. 25, 1958.

Paul P. O'Brien, Clerk.

APPENDIX C.

Judgment.

[TITLE OF COURT AND CAUSE]

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: March 25, 1958

PAUL P. O'BRIEN, Clerk.